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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 UNITED STATES OF AMERICA,  
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10 Plaintiff,

11 v.

12 ANDREW HOUSTON POINTER,  
13 Defendant.

CASE NO. CR08-5604RJB

ORDER DENYING DEFENDANT'S  
POINTER'S MOTION FOR  
REDUCED SENTENCE

14 This matter comes before the court on the defendant Pointer's Motion to Reduce Sentence  
15 (Dkts. 141 & 144). The court is familiar with the records and files herein and all documents filed  
16 in support of and in opposition to the motion. The court has also reviewed the transcript of the  
17 sentencing proceeding; the Presentence Report; and the Statement of Reasons. The court has  
18 directed that the latter two documents be filed under seal, since they are ordinarily not part of the  
19 court file.

20 Mr. Pointer was sentenced to 108 months in prison pursuant to a Federal Rule of  
21 Criminal Procedure 11(c)(1)(C) plea agreement (Dkt. 114) following his plea of guilty to a  
22 charge of Possession With Intent To Distribute Cocaine Base (Count 1 of the Superseding  
23 Information, Dkt. 113). At the time of his sentencing, his guideline range, as determined by the  
24 court, was 130 to 162 months. Amendments to the crack cocaine sentencing guidelines reduced

1 the guideline range in the defendants' case to 92 to 115 months. The defendant here seeks a  
2 reduction in his sentence pursuant to the authority of 18 U.S.C. § 3582(c)(2).

3 18 U.S.C. § 3582(c)(2) provides as follows:

4 [I]n the case of a defendant who has been sentenced to a term of imprisonment  
5 based on a sentencing range that has subsequently been lowered by the Sentencing  
6 Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director  
7 of the Bureau of Prisons, or on its own motion, the court may reduce the term of  
imprisonment, after considering the factors set forth in section 3553(a) to the extent that  
they are applicable, if such a reduction is consistent with applicable policy statements  
issued by the Sentencing Commission.

8 The threshold question in this case is whether the defendant's term of imprisonment was  
9 "based on a sentencing range that has subsequently been lowered by the Sentencing Commission  
10 . . . ." Unfortunately for the defendant, and possibly unfortunately for the cause of justice, an  
11 analysis of the Supreme Court's opinions in *Freeman v United States*, 131 S. Ct. 2685 (2011),  
12 indicates that the defendant's term of imprisonment was not "based on" his guideline sentencing  
13 range.

14 Counsel for both parties to this case agree that *Freeman* is controlling and further agree  
15 that it is Justice Sotomayor's concurring opinion that must be followed by the court in this case.  
16 That opinion sets out the task before the court: "[I]n applying § 3582(c)(2), a court must discern  
17 the foundation for the term of imprisonment imposed by the sentencing judge." *Freeman*, 131  
18 S. Ct. at 2695. The record herein clearly indicates that the undersigned considered the  
19 Sentencing Guidelines in determining to accept the plea agreement. As was stated in the  
20 *Freeman* concurrence, "In the (C) agreement context, therefore, it is the binding plea agreement  
21 that is the foundation for the term of imprisonment to which the defendant is sentenced."  
22 *Freeman*, 131 S. Ct. at 2696. "Allowing district courts later to reduce a term of imprisonment  
23 simply because the court itself considered the Guidelines in deciding whether to accept the  
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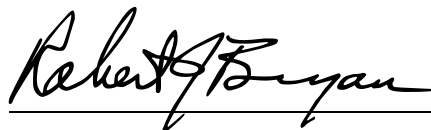
1 agreement would transform § 3582(c)(2) into a mechanism by which courts could rewrite the  
2 terms of (C) agreements in ways not contemplated by the parties." *Id.* "By the same token, the  
3 mere fact that the parties to a (C) agreement may have considered the Guidelines in the course of  
4 their negotiations does not empower the court under § 3582 (c)(2) to reduce the term of  
5 imprisonment they ultimately agreed upon . . . ." *Id.* at 2697.

6 This case is distinguishable from *Freeman* in that Freeman's plea agreement indicated  
7 that the parties agreed to have the sentence "determined pursuant to the Sentencing Guidelines."  
8 *Id.* at 2699. In defendant Pointer's case, his sentence was not in any way directed by or directly  
9 related to the Sentencing Guidelines. The Guidelines were only one consideration before the  
10 parties in reaching the plea agreement, and they were only one consideration of the court in  
11 determining to accept the plea agreement. Under the ruling of the *Freeman* case, Pointer's  
12 sentence was not "based on the Guidelines." This court simply has no authority to modify the  
13 defendant's sentence pursuant to U.S.C. § 3582(c)(2). Defendant Pointer's Motion to Reduce  
14 Sentence (Dkt. 44) must be **DENIED**.

15 **IT IS SO ORDERED.**

16 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
17 to any party appearing *pro se* at said party's last known address. The Clerk is further directed to  
18 file the transcript of the May 7, 2010 sentencing proceedings; and to file the Presentence Report  
19 and the Statement of Reasons under seal.

20 Dated this 24th day of February, 2012.

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23 ROBERT J. BRYAN  
24 United States District Judge